IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
THOMAS G. BERNDSEN,	)	**Supreme Court #SC86342**
	)	
Respondent.	)	

INFORMANT'S REPLY BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

POINT RELIED ON

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE (RULE 4-8.4(d)) IN THAT HE PREPARED AND SENT TO OPPOSING COUNSEL A MOTION FOR PROTECTIVE ORDER CONTAINING A SERIOUS ALLEGATION AGAINST OPPOSING COUNSEL WHEN HE HAD LITTLE OR NO BASIS FOR MAKING THE ALLEGATION, THEN DID NOT FILE THE MOTION, AND INSTEAD ALLOWED THE MOTION TO GO FORWARD THE NEXT MORNING WITHOUT CLARIFYING TO THE COURT OR OPPOSING COUNSEL THAT HE NOT ONLY HAD NOT FILED THE MOTION, BUT HAD DECIDED NOT TO DO SO.

In re Hardge-Harris, 845 S.W.2d 557 (Mo. banc 1993)

In re Ver Dught, 825 S.W.2d 847 (Mo. banc 1992)

In re Westfall, 808 S.W.2d 829 (Mo. banc 1991)

Rule 4-8.4(d)

ARGUMENT

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE HE ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE (RULE 4-8.4(d)) IN THAT HE PREPARED AND SENT TO OPPOSING COUNSEL A MOTION FOR PROTECTIVE ORDER CONTAINING A SERIOUS ALLEGATION AGAINST OPPOSING COUNSEL WHEN HE HAD LITTLE OR NO BASIS FOR MAKING THE ALLEGATION, THEN DID NOT FILE THE MOTION, AND INSTEAD ALLOWED THE MOTION TO GO FORWARD THE NEXT MORNING WITHOUT CLARIFYING TO THE COURT OR OPPOSING COUNSEL THAT HE NOT ONLY HAD NOT FILED THE MOTION, BUT HAD DECIDED NOT TO DO SO.

Mr. Berndsen labors mightily to transform this case into a whole lot of cases it is not. It is not a libel case. Because it is not a libel case, Informant did not bear the burden of proving false the "ultimate fact by which the veracity of the motion should be judged." Respondent's brief, Point Relied On II, p. 25.

It is not an abuse of process case. Because it is not an abuse of process case, Informant bore no burden to prove that Respondent faxed Mr. Osterholt the objectionable motion for a collateral purpose, or that he lacked a "reasonable basis" for sending the

motion. Respondent's brief, Point Relied On III.

And, Mr. Berndsen, not Mr. Osterholt, is the respondent in this disciplinary case. One could easily reach the contrary conclusion from reading the argument under Respondent's third Point Relied On. It is a shopworn and properly discredited tactic in lawyer discipline matters to decry another lawyer's alleged lapses to justify and divert attention from one's own ethical violations. As this Court said in *In re Cupples*, 952 S.W.2d 226, 232 (Mo. banc 1997), "alleged improprieties by one attorney do not give another attorney the right to act [unethically]."

This case is an original disciplinary proceeding against Thomas Berndsen that had as its genesis an admonition for violation of Supreme Court Rule 4-8.4(d). The admonition issued by the regional disciplinary committee constitutes a finding of probable cause by a community of lawyers and lay persons that a violation has occurred. Mr. Berndsen rejected the disciplinary committee's admonition, causing an information to be filed charging him with violation of Rule 4-8.4(d), all in accordance with the procedures set forth in Rule 5.11. Informant's burden, then, was to prove by a preponderance of evidence that Respondent engaged in conduct prejudicial to the administration of justice, a burden met and exceeded by this record.

Supreme Court Rule 4-8.4(d) reads in its entirety as follows:

It is professional misconduct for a lawyer to:

> (d) engage in conduct that is prejudicial to the administration of justice;

The Rule does not require Informant to prove a dishonest act – that conduct is

encompassed by Rule 4-8.4(c) and was not pled in this case. It does not require Informant to prove that the conduct "interfered with," or "altered," the underlying proceeding, as Mr. Berndsen's brief claims. It requires that Informant plead facts and prove that Respondent's conduct was "prejudicial to" the administration of justice. Examples of conduct the Court has concluded violate Rule 4-8.4(d) include the following: *In re Hardge-Harris*, 845 S.W.2d 557 (Mo. banc 1993) (lackadaisical and evasive about producing documents to disciplinary authorities); *In re Ver Dught*, 825 S.W.2d 847 (Mo. banc 1992) (failure to correct false impression left by client's false testimony as to non-material facts); *In re Westfall*, 808 S.W.2d 829 (Mo. banc 1991) (lawyer's statements imputed lack of integrity and misconduct to judge's work and were without basis in caselaw). By faxing a motion to opposing counsel containing a highly inflammatory allegation against opposing counsel, and then not filing it, but instead allowing Mr. Osterholt to proceed the next morning on the reasonable assumption that the motion had been filed, Respondent wasted the Court's time, the witness' time, and engaged in conduct prejudicial to the administration of justice.

The Missouri Supreme Court has the inherent power to discipline individuals enrolled as members of the Bar of Missouri. *In re Veach*, 287 S.W.2d 753, 758 (Mo. banc 1956). So essential to the Court's responsibility to uphold the integrity of the legal profession is this inherent power that it extends even to misconduct not connected to the lawyer's practice of law. See *In re Panek*, 585 S.W.2d 477 (Mo. banc 1979). Of course, that is not an issue in this case, as Mr. Berndsen's misconduct and Rule 4-8.4(d) both encompass his practice of law. Mr. Berndsen's conduct was outside accepted norms of

practice, even in a highly contentious case.

The Information charged Respondent with violating Rule 4-8.4(d) by engaging in the following conduct:

> Respondent prepared a Motion for a Protective Order falsely alleging that the Complainant had attempted to edit portions of a deposition. Respondent then faxed the Motion and a Notice of Hearing to the Complainant, with a hearing date of April 15, 1997. The complainant appeared in court with the deposition court reporter and, at that time, the Respondent did not dispute the court reporter's evidence that the court reporter was not asked to alter the transcript. The Respondent advised the court that the motion had never actually been filed but only faxed to complainant in contemplation of filing.

Information, **A-96**. The testimony of Mr. Osterholt, Ms. O'Brien,[1] and Mr. Berndsen, as

[1] Ms. O'Brien's testimony is not nearly so unequivocably favorable to Respondent as is stated under Respondent's second Point Relied On. She testified that she did not recall ever telephoning Mr. Berndsen after the call that Mr. Osterholt made to her, that it did not sound like something she would do, although it was not impossible that she could have called him, and that while she had a very general memory of discussing with Mr. Berndsen her company policy about editing videotapes, she denied outright that she ever suggested to Mr. Berndsen that he take action to prevent any alleged editing, which is what Mr. Berndsen testified that his mystery caller told him. **A-23 (T. 81-84)**.

well as Informant's exhibits, all contributed to a factual record that substantiated the Information's factual allegation. See Informant's brief, Statement of Facts, p. 4-9. A majority of the disciplinary hearing panel made a specific finding of fact that Mr. Berndsen's testimony regarding what allegedly prompted him to send the motion to Osterholt "lack[ed] all credibility." Although that finding is not binding on this Court, the fact that the regional disciplinary committee and a majority of the disciplinary hearing panel came to the same conclusion – that Respondent's conduct was prejudicial to the administration of justice, is telling.

Respondent was given appropriate and timely notice of the facts alleged to constitute a violation of Rule 4-8.4(d). The evidence adduced at hearing supported the factual allegations by more than a preponderance of evidence. Informant properly pled and proved its case. A majority of the disciplinary hearing panel found Informant's evidence credible and concluded that Respondent's conduct constituted prejudice to the administration of justice and was sanctionable by a public reprimand. Informant likewise urges the Court to conclude that Mr. Berndsen's conduct, for all the reasons more fully set forth in Informant's brief, was outside accepted norms and conventions of ethical practice and was, therefore, prejudicial to the administration of justice and deserving of a public reprimand.

CONCLUSION

Lawyers must maintain high standards of professionalism to preserve the integrity of the courts and profession. Mr. Berndsen's conduct with regard to the motion for protective order fell far short of the standards the Court should expect from its officers. Respondent violated Rule 4-8.4(d), for which he should receive a reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2005, two copies of Informant's Reply Brief have been sent via First Class mail to:

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Attorney for Respondent

_____
Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Special Rule No. 1(b);

3. Contains 1,700 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin